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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 43-473

DANIEL T. TAYLOR, III, - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE PETITIONER

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky is reported at 494 S. W. 2d 737, and is printed in the Appendix, *infra,* pp. 5-19.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3), and the petitioner claims that his conviction for criminal contempt was obtained in violation of rights guaranteed to him by the Constitution of the United States. The judgment of the Court of Appeals of Kentucky was entered on March 23, 1973.

A Petition for Rehearing was denied on June 15, 1973. The Petition for a Writ of Certiorari was filed in this Court on September 12, 1973, and the Petition was granted on December 3, 1973.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

QUESTIONS PRESENTED

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on

no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

STATEMENT OF THE CASE*

The petitoner, an attorney, has challenged on constitutional grounds his summary conviction for criminal contempt by the respondent (hereinafter referred to as the trial judge) and the imposition of a sentence, as subsequently modified by the respondent and the Court of Appeals of Kentucky, of six months' imprisonment. The contempt conviction arose out of events occurring during the trial of Narvel and William M. Tinsley on a charge of wilful murder. The petitioner represented Narvel Tinsley, working without pay, during the trial, which was held in the Criminal Branch, Second Division, Jefferson Circuit Court, Louisville,

*References to the transcript of the trial of *Commonwealth* v. *Tinsley* that are not included in the Appendix are indicated by the prefix "Tr." References to the Transcript of Record in *Commonwealth* v. *Tinsley* are indicated by the prefix "R."

Kenutcky, from October 18, 1971, through October 29, 1971. The defendants, young black men, were accused of killing two white police officers. The trial attracted a great deal of press and public attention and was hotly contested.

The petitioner is a well-known and experienced criminal defense and civil rights lawyer in Kentucky. In a career spanning some 20 years he has defended literally hundreds of capital cases, often without pay. His reputation for vigorous, innovative, and effective advocacy was known to the trial judge, himself a former prosecutor.

At the time of the trial the death penalty was still in effect in Kentucky, and the prosecutor publicly announced in advance of the trial that he would seek the death penalty against both defendants. The prosecution anticipated that it would have no problem in the placing of blame as to the killing of one of the officers on William Michael Tinsley, but it had no direct evidence as to the killing of the other officer by either brother. The essence of Narvel's defense would necessarily involve implicating his brother in the shooting of this other officer, and for this reason both the petitioner and Michael's attorneys moved for a severance on the ground that the defenses contemplated by the defendants were totally antagonistic. These motions were denied by the trial judge.

A very important part of Narvel's defense was that the police and public officials realized the weakness of the case against him, and as a result embarked on a propaganda campaign to plant the impression in the

mind of the public (which from their standpoint hopefully would include prospective jurors) that Narvel was guilty of the shooting of the second police officer. There were press conferences and television appearances by police and governmental officials, a widely-publicized "manhunt" for the Tinsley brothers, and a solicitation of funds for the "victims" of the crime by a leading brokerage house in Louisville (App. 5; R. 14-15). Contempts 2, 7, and part of 5 arose from the petitioner's efforts to develop this line of defense (App. 24-25).

The only eyewitness testimony presented by the prosecution was one David Keith White, a black youth who was either with or not with the Tinsley brothers at the time of the shooting, depending on which of his several versions of the event was to be believed. He never testified that he saw Narvel shoot the second officer, gave inconsistent versions of whether he saw Narvel with a gun in his hand, and admitted that he had previously lied to the police in order to escape arrest and would do so again (Tr. 2112). Destroying White's credibility was absolutely crucial to Narvel's defense. Contempt 6 arose from the petitioner's efforts in this respect (App. 25). Throughout the trial the trial judge rigorously controlled all ingress and egress to the courtroom through the use of locked doors, and at one point had the windows overlooking an adjoining area way covered with opaque sheets. All persons entering the courtroom had to submit to a search, including the petitioner's assistants. The front rows of the seating section were reserved for the

mourners of the two slain officers, and understandably they wept at frequent intervals. Numerous armed police officers, both in uniform and plainclothes, were seated among the spectators. At the same time there were often empty seats in the courtroom, but a queque of spectators outside trying to obtain admission (App. 95). At one point the petitioner remonstrated with the trial judge over the exclusion of the spectators, contending that this violated his client's right to a public trial. The trial judge overruled the objection with the observation that: "The courtroom's full enough. If I've got two people out there, there's a public trial as far as I'm concerned." (Tr. 1895). Part of contempt 5 was simply that the Petitioner had made this objection (App. 25).

It is the petitioner's submission that the trial judge, realizing from the outset the weakness of the prosecution's case against Narvel, and determined that in the final tallying there would be "two black lives for two white ones," did absolutely everything that he could to help the prosecution obtain a conviction against Narvel and a verdict of death by electrocution.[1] Beginning with his refusal to sever the trials, and concluding with his effectively instructing the jury to find Narvel guilty of the shooting of the second officer by directing a verdict in favor of Michael as to this death, he tried in every way possible to interfere with the successful presentation of Narvel's defense, and to convey to the jury his firm belief that Narvel was guilty of wilful

[1]The nature and extent of the trial judge's actions in this regard are fully set forth in the Petition for Certiorari filed in *Tinsley* v. *Commonwealth*, No. 73-5768, this Term.

murder and should be sentenced to death. In so doing he was hostile, sarcastic and threatening toward the petitioner and did not attempt to hide his feelings toward the petitioner and his client from the jury. It was in the context of this hotly-contested trial, accompanied by an evident drive by the judge to bring about a conviction, that the petitioner was called upon to represent and protect his client.

The jury voire dire lasted for three days. The first citation of the petitioner for contempt occured during the petitioner's examination of a prospective juror. The trial judge informed the petitioner that he was in contempt for "asking the same question," and stated that he would impose punishment later (App. 30). He then ordered the petitioner and the prosecutor (but not the other lawyers), to file written questions for the voire dire and announced that he was going to take it over. He also modified the contempt citation to a warning (App. 37).

The prosecution began its case on October 21, and concluded on October 25. It presented 14 witnesses, all of whom were permitted to testify without question. Two of the remaining eight citations for contempt occurred during this time. As to these counts, counts 2 and 3 in the "eorrected judgment", the petitioner was permitted to respond "for the record," but this response was intermingled with a discussion of the substantive issues of the case. At no time did the trial judge inform the petitioner as to what the precise charges were, nor did he give the petitioner any meaningful opportunity to respond to the charges.

The presentation of the case for the defendants began on October 26, and continued through October 28. No evidence was presented on behalf of Michael Tinsley. Narvel Tinsley testified in his own behalf. In addition, the petitioner sought to call 21 other witnesses, 9 of whom were summarily prohibited from testifying by the trial judge. Counts 4 through 9 of the contempt charges occurred while the petitioner was attempting to present the defense. There was some discussion in chambers following the citation on count 4, but it had nothing to do with the contempt charge (App. 70-79). As to count 5, the judge cited the petitioner in chambers only while in the process of ruling that a witness whom the petitioner had been examining would not be permitted to testify further (App. 97). He then ordered the petitioner to produce a list of all other witnesses whom he intended to call for the defense, and summarily ruled that 9 of them, all of whom had been properly subpoenaed, would not be permitted to testify (App. 97; 101-106; Tr. 1986-1998).

The intense conflict between the judge and the petitioner flowed directly from the conflict of their objectives. The judge was determined to bring about a conviction. The petitioner was just as equally determined to represent his client within his good-fatih understanding of the permissible parameters of his proper role. Though this Court is not reviewing the question of whether the conduct of the petitioner was, in fact, contemptuous, the conflict between judge and defense counsel is of obvious importance in the Court's consideration of the questions which the Court has ac-

cepted for review. That conflict, and the emanations therefrom, is plainly relevant to the ability of the trial judge to sit impartially in judgment on the multiple contempt charges against the petitioner. It is equally relevant to the question of whether in the case of this type of conflict between a judge and a defense attorney, a jury, rather than simply another judge, should be called upon to adjudicate the issues. Moreoevr, the fundamental unfairness of the type of summary procedure here employed becomes more obvious in the light of the underlying conflict between the judge and the defense attorney against whom he was proceeding. On count 6 the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said that he could do so at the next recess (App. 106-107). However, this opportunity did not occur. On count 7 the trial judge permitted the petitioner to make a response for the record, but then directed the court reporter not to put the response in the record (App. 108-109). He specifically refused to permit the petitioner to make a response for the record on count 8 (App. 113). On count 9 he again simply informed the petitioner that he was in contempt (App. 119).

At the conclusion of the trial, after the jury had returned its verdict, finding both defendants guilty and sentencing them to death, but while the jury was still in the box, the following colloquy occurred:

> "The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.
>
> Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting Unless you intend to gag me—

The Court: (Interrupting) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail, Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you" (App. 28-29).

At the conclusion of his colloquy, the petitioner was placed in the custody of peace officers and taken to the Louisville City Jail. The trial judge refused to make himself available to petitioner's counsel for the purpose of setting bail, and a bail hearing had to be ordered by the Court of Appeals of Kentucky. The trial judge refused to allow the petitioner to be present at the hearing, and also denied bail. Bail was finally ordered by the Kentucky Court of Appeals, and the

petitioner filled same, and was released. On November 4, 1971, the trial judge entered an order prohibiting the petitioner from "further practice of law in this Court."

After the petitioner had filed his appeal in the Court of Appeals of Kentucky, the trial judge, on February 8, 1972, over three months after the trial had ended, moved the Court of Appeals for permission to correct the judgment, and his motion was granted over the objection of the petitioner. In the corrected judgment the trial judge stated that the first count of contempt should be changed to a warning, and he reduced the sentence of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts, six of which were punished by six months in jail, one of which was punished by 60 days in jail and one of which was punished by 90 days in jail. He did not specifically state that the sentences were to run consecutively, as he did when imposing sentence from the bench, but he also did not state that they were to run concurrently (App. 29).

In his appeal to the Kentucky Court of Appeals the petitioner raised all issues covered in the grant of certiorari (App. 4), as well as other constitutional and state law questions. The Court of Appeals held that the order prohibiting the petitioner from the practice of law in the Second Division was improper under state law and set it aside. With respect to the petitioner's contention that he was entitled to a jury trial on the

contempt charges, the Court of Appeals held that the sentences should now be served concurrently rather than consecutively, and that since the total sentence would not then exceed six months, the petitioner was not entitled to a jury trial. In all other respects it affirmed the conviction and rejected the petitioner's constitutional contentions. Petitioner's Petition for Rehearing to the Court of Appeals was denied on June 15, 1973, without comment. Certiorari was granted by this Court on December 3, 1973. On September 19, 1973, Mr. Justice Stewart issued an order staying enforcement of the judgment of the state court pending disposition of the case by this Court.

SUMMARY OF ARGUMENT

I. When the petitioner was sentenced to serve consecutive sentences aggregating 54 months' imprisonment, he stood charged with a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee, and it is irrelevant that his sentence was subsequently modified to a maximum of six months' imprisonment. This Court has not adopted and should not adopt a "six month rule" in criminal contempt cases, upholding the denial of the right to trial by jury where the actual sentence imposed, including by retroactive amendment if necessary, does not exceed six months regardless of other objective criteria reflecting the seriousness of the particular offense. Even if this Court were to adopt a "six month rule," the entitlement to a jury trial should attach at the time the sentence is originally imposed, and the right to a jury trial should

not be able to be defeated as it was here, by subsequent modification of the sentence on the part of the trial judge or the reviewing court.

By imposing the extraordinarily severe sentence that he did, the trial judge necessarily "certified" that the petitioner was charged with having committed a very serious offense. The Kentucky Court of Appeals, while holding in one portion of its opinion that the petitioner was only charged with a "petty" offense within the meaning of the trial by jury guarantee, in another portion of its opinion attacked the petitioner's character in the most opprobrious terms and accused him of planning to disrupt the trial and by any means possible to cause the trial judge to commit reversible error.

In Kentucky, observing "the laws and practices of the community taken as a gauge of its social and ethical judgments," criminal contempt is considered a serious offense. Since the right to trial by jury may depend on the seriousness with which a particular state regards the offense, the right to trial by jury should attach to alleged criminal contempts committed before the Kentucky courts when a substantial period of imprisonment is imposed as punishment.

This Court should now consider whether criminal contempt is a serious offense within the meaning of the trial by jury guarantee regardless of the penalty involved. Because conduct that can be made punishable as criminal contempt must have the effect of actually interfering with the administration of justice, criminal contempt is an offense which is likely to be regarded as

contrary to the "social and ethical judgments of the community." Moreover, the nature of the offense necessarily involves a confrontation between the accused and the court, and the "appearance of justice" is not satisfied when judges, without the intervention of a jury, pass on charges of criminal contempt.

The Court should also consider whether the possibility of any imprisonment is sufficient to entitle an accused to a jury trial. The "different geneology" of the right to trial by jury should not set it apart from the other guarantees of the Sixth Amendment, which do not depend for their application on the extent of possible imprisonment faced by the accused.

II. The petitioner was deprived of due process of law when the trial judge proceeded summarily to find him guilty of contempt and to impose punishment. Due process should require that an alleged contemnor, like any other defendant, be given notice of the charge and an opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. It is immaterial that the alleged contempt was committed in the presence of the trial judge, since the trial judge may be persuaded that he has perceived the facts inaccurately, or that the conduct for which he has cited was not contemptuous, or that an intention to obstruct the administration of justice was lacking. The right to notice of the charge and the opportunity to be heard is clearly required where, as here, the trial judge did not cite and simultaneously punish for contempt in order to restore courtroom decorum or the like. However, no exception should be made for contempts arising

out of courtroom disruption, since regardless of the time at which the trial judge acts or his motivation for so doing, he is still finding a person guilty of a criminal offense and imposing punishment.

The right for which the petitioner is contending should be construed to encompass a statement of the precise charge and the facts giving rise to that charge, the opportunity to be heard in defense or mitigation, including where necessary, the right to present extrinsic evidence, a ruling on guilt or innocence, and the imposition of punishment if the contemnor is found guilty.

The petitioner was not afforded this right with respect to any of the charges of which he was found guilty. While the petitioner was permitted to respond for the record on two of the eight charges, the trial judge made it clear that his mind was made up about the petitioner's guilt as soon as he cited the petitioner for contempt on those charges. The trial judge did not hold a *hearing* on any of the charges in the sense of separating the contempt charge from the other matters involved in the trial, stating the precise charge and the facts giving rise to that charge, indicating that he was prepared to listen objectively to arguments in defense or mitigation, and so doing, and ruling on the petitioner's guilt or innocence.

The Court should now consider whether summary punishment for contempt itself is violative of due process of law. Summary punishment for contempt, which combines the otherwise inconsistent functions of lawmaker, prosecutor, judge, and jury in a single individual who is necessarily involved in the events

leading up to the charge, is contrary to the fundamental premises upon which the concept of due process of law is based. Neither the "judicial economy" or "preserving order" justification can be considered sufficient to sanction this "anomaly in the law." Even though the trial judge has witnessed the alleged contempt, he may still be mistaken as to the actual facts and as to whether the conduct of the alleged contemnor amounted to criminal contempt, which is demonstrated by the numerous reversals of summary contempt convictions by appellate courts. The "preserving order" justification is completely undercut when the trial judge waits until the end of the trial to punish for contempt, and at a minimum this Court should hold that due process prohibits the exercise of the summary contempt power after the trial has terminated and in any case where such exercise is not shown to have been necessary for the purpose of preserving order in the courtroom. However, the exercise of the summary contempt power cannot be justified even where purportedly necessary to prevent courtroom disruption, since there are numerous other methods the trial judge can employ to prevent disruption, that are not subject to the abuses of the exercise of the summary contempt power.

III. In the circumstances of this case the trial judge could not impartially sit in judgment on multiple contempt charges against the petitioner. All four elements of "embroilment in controversy" were clearly present, and the holding of the Kentucky Court of Appeals to the effect that the trial judge could impartially sit in judgment on the contempt charges is

truly astonishing. The record clearly shows that the trial judge was an "activist seeking combat," that he perceived himself as the victim of a "personal attack," that he was charged by the petitioner with bias and unfairness, and that he had adopted an adversary posture with respect to the petitioner. The animus and hostility of the trial judge toward the petitioner and his obvious lack of impartiality fairly "scream out" from the record, and are manifested by his statements and actions throughout the trial, culminating in his behavior at the conclusion of the trial when he not only accused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him and impose more contempts if he persisted in trying to do so, and directed the bailiff to "take him away."

The conviction of the petitioner must be reversed, if for no other reason, than that he was denied the right to trial before an unbiased judge.

ARGUMENT

I.

When the Petitioner Was Sentenced to Serve Consecutive Sentences Aggregating 54 Months' Imprisonment on Multiple Contempt Charges, He Stood Charged with a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury, and His Right to a Jury Trial Was Not Affected by the Subsequent Actions of the Trial Judge and Reviewing Court in Modifying the Sentences to a Maximum of Six Months' Imprisonment.

A. This Court has not held and should not hold that where the actual sentence imposed for criminal contempt does not exceed six months' imprisonment, there is no right to trial by jury regardless of other objective criteria reflecting the seriousness of the particular offense.

When the trial judge ordered the peace officers to "take him away," the petitioner faced a prison sentence of 54 months' imprisonment, including one year on each of two counts. As the trial judge subsequently realized, he could not, without the intervention of a jury, impose a sentence of one year's imprisonment on a single count, *Baldwin* v. *New York,* 399 U. S. 66 (1970), and as he specifically stated, in order that the petitioner's right to trial by jury not come into play, he reduced the sentences on those two counts to six months each (App. 27). Assuming that the sentences were to run consecutively, and with the first count dropped, the petitioner then faced 41 months' imprisonment, and he argued before the Kentucky Court of Appeals that such a sentence could not be imposed without the intervention of a jury.

While the petitioner's case was pending, the Kentucky Court of Appeals held in another case that there could not be imprisonment for more than six months for contempt of court "except upon the unanimous verdict of a jury under instructions including the reasonable doubt protection as in comparable criminal cases." *Local No. 1667, United Auto Workers* v. *Kawneer Company, Inc.*, Ky., 490 S. W. 2d 747 (1973). Under this approach, it necessarily followed that separate sentences for contempt had to be aggregated for the purpose of determining the alleged contemnor's right to a jury trial. *C.f. United States* v. *Seale*, 461 F. 2d 345 (7th Cir., 1972). In order to bring the petitioner's case within the "six month rule," the Court of Appeals gratuitously directed that the petitioner's sentences be served concurrently rather than consecutively (App. 20). It also read this Court's decisions in *Frank* v. *United States*, 395 U. S. 147 (1969), and *Baldwin* v. *New York, supra*, as setting forth a constitutional "six month rule" and holding that where the actual penalty imposed for criminal contempt, including by retroactive modification if necessary, did not exceed six months, there was no right to a jury trial regardless of other objective criteria reflecting the seriousness of the particular offense. It is submitted that this Court has not set forth any "six month rule" as determinative of the right to trial by jury in cases of criminal contempt, and that where a person has been charged with committing a serious criminal contempt, the Sixth Amendment's guarantee of trial by jury applies irrespective of the penalty that is actually imposed.

In looking for "objective indications of the seriousness with which society regards an offense," *Frank* v. *United States, supra* at p. 148, this Court has found the most relevant criterion to be the severity of the maximum authorized penalty rather than the penalty actuallly imposed, *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and in *Baldwin* v. *New York, supra,* it held that where the maximum authorized penalty exceeded six months, the defendant was constitutionally entitled to a jury trial. It has also held that the right to a jury trial may depend on the nature of the offense itself, and that a particular offense may be regarded as sufficiently serious to entitle the defendant to a jury trial, even though the maximum authorized penalty is relatively small. *District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

The same principles are presumably applicable to determine the right to a jury trial on the part of a person charged with criminal contempt. Where the maximum penalty for criminal contempt has been prescribed by statute, this Court has looked to the statutory authorization for the purpose of determining whether this was a serious offense, entitling the alleged contemnor to a jury trial. *Dyke* v. *Taylor Implement Manufacturing Co.,* 391 U. S. 216 (1968); *Frank* v. *United States, supra* at p. 149, n. 2. However, in a number of states the legislature has not placed any limits on the courts' power to punish for contempt. It could be contended that since, in the absence of a statutorily authorized maximum punishment or a general statutory provision prescribing the punishment for

offenses for which no penalty is otherwise provided, see *e.g.*, Ky. Rev. Stat. 431.075, an alleged contemnor is subject to the most severe punishment that the state can impose for any offense, criminal contempt is necessarily a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee. Admittedly this has not been the approach that this Court has taken to entitlement to a jury trial in cases of criminal contempt, and where there is no maximum authorized punishment, this Court has stated that, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Frank* v. *United States, supra* at p. 149.

However, although this court has upheld sentences for criminal contempt of up to six months, *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), it has not held that there is a "six month rule," nor has it held that while the severity of the penalty actually imposed may be the best indication of the seriousness of the particular offense, it is the *only* indication. It definitely has not held that so long as the penalty actually imposed, including by retroactive modification if necessary, does not exceed six months, there is no right to a jury trial regardless of other objective indications showing that *particular charges of criminal contempt in particular circumstances* involved a "serious offense" within the meaning of the trial by jury guarantee.

Moreover, even the maximum authorized penalty has not been treated as determinative of the seriousness of a particular offense. Its relevance is only that it

may be "taken as a gauge of [the] social and ethical judgments of the community," *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937), and even though the maximum authorized penalty is relatively small, the "social and ethical judgments of the community" may dictate that the particular offense is a serious one within the meaning of the trial by jury guarantee. *District of Columbia* v. *Colts, supra.* ("Driving recklessly as to endanger persons and property" was serious offense, although maximum authorized punishment was a fine of $100 and 30 days' imprisonment). It is clear that both the maximum authorized penalty and the nature of the particular offense must be looked to in order to determine whether the offense is a serious one within the meaning of the trial by jury guarantee. *Baldwin* v. *New York, supra* at p. 69, n. 6. Especially in the case of criminal contempt, which as this Court has said, covers "a great many different type of offenses, ranging from disrespect to the court to acts otherwise criminal," *Frank* v. *United States, supra* at p. 149, the nature of the particular offense is of the utmost importance in determining whether the alleged contemnor has been charged with a serious offense so as to be entitled to trial by jury. Where, in the circumstances of a particular case, and in light of the "social and ethical judgments of the community," there are objective indications that a particular contempt is a "serious" one, the alleged contemnor is entitled to a trial by jury notwithstanding that the final penalty imposed does not exceed six months' imprisonment.

B. The petitioner was charged with committing a serious offense within the meaning of the trial by jury guarantee.

In the circumstances of this case and in light of the "social and ethical judgments of the community," the petitioner was clearly charged with committing a serious offense within the meaning of the Sixth Amendment's guarantee of trial by jury. Indeed, if the severity of the penalty imposed is the best indication of the seriousness of the particular offense, *Frank* v. *United States, supra,* the petitioner certainly stood charged with committing a serious offense when the trial judge imposed consecutive sentences aggregating 54 months' imprisonment, including one year on each of two counts. The only reason that the sentence was subsequently modified and the separate counts were ordered to run concurrently was to defeat the petitioner's claim of entitlement to trial by jury. In his "corrected judgment" the trial judge specifically stated that this was why he was reducing the one year sentences to six months each (App. 20). Likewise, the Kentucky Court of Appeals stated that the sentences *must* be served concurrently, and then held that since they would be served concurrently, the petitioner was not entitled to a jury trial.[2] More significantly, by imposing the extraor-

[2]In so holding, the Court either disregarded or overruled *sub silento* its previous holdings to the effect that whether sentences were to run consecutively or concurrently was in the exclusive discretion of the trial judge, *McBride* v. *Commonwealth,* 432 S. W. 2d 410 (1968), and that if the judgment does not provide otherwise, multiple sentences are construed to run consecutively. *Beasley* v. *Wingo,* Ky., 432 S. W. 2d 413 (1968). It is also interesting to

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dinarily severe sentence that he did, the trial judge necessarily "certified" that the petitioner was charged with having committed a very serious offense. The seriousness of the purported offense in the eyes of the trial judge is further evidenced by his extreme statements from the bench at the time he sentenced the petitioner, his refusal to admit the petitioner to bail pending appeal or even to hold a bail hearing until ordered to do so by the Court of Appeals, and his entry of an invalid order prohibiting the petitioner from the practice of law in "his court."

The Court of Appeals, while holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, said of the allegedly contemptuous conduct that it was "such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly and speedy trial" (App. 9). It attacked the petitioner's character in the most opprobrious terms, accusing him of "embarking upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal," and of creating an atmosphere in the court in which he "would

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note that while the trial judge originally argued that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee in Taylor v. Hayes, pp. 2, 17), in response to the arguments put forth in the Petition for Rehearing, he stated that he had intended to limit the total sentence to six months in the corrected judgment. (Response to Petition for Rehearing in Taylor v. Hayes, p. 1).

have appeared to be the star performer in the center ring of a three-ring circus" (App. 8). The petitioner, of course, would most vigorously dispute these charges, which are totally unsupported by the record, and would contend that he did nothing more than zealously defend the rights of his client charged with a capital offense. But it is utterly incongruous for the Court of Appeals in one portion of the opinion to attack the petitioner's character and conduct in this most opprobious way and in another portion of the opinion to hold that he was only charged with a "petty" offense within the meaning of the trial by jury guarantee. The characterization of the petitioner's conduct in this way, coupled with the severity of the sentence originally imposed, certainly supplies the "objective criteria reflecting the seriousness of the offense," *Frank* v. *United States, supra,* within the meaning of the trial by jury guarantee. The petitioner was clearly charged with "serious contempt," and was therefore, entitled to a trial before a jury on the charges.

The seriousness of an offense for purposes of entitlement to trial by jury may also be "observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *District of Columbia* v. *Clawans, supra* at p. 628. It is quite clear that in Kentucky criminal contempt is considered a serious offense. The Kentucky legislature has indicated its view in this regard by limiting the punishment that can be imposed for contempt without the intervention of a jury to a maximum fine of $30 and

imprisonment for 24 hours in the case of contempt by a recalcitrant witness, Ky. Rev. Stat. 421.140, and in all other cases of contempt to a maximum fine of $30 and imprisonment for 30 hours. Ky. Rev. Stat. 436.020. In so doing, it has "included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank* v. *United States, supra* at p. 149. In *Arnett* v. *Meade,* Ky., 462 S. W. 2d 940 (1971), the Kentucky Court of Appeals, declared Ky. Rev. Stat. 421.140 unconstitutional under state law as an interference with the judicial function, and in the case at bar it declared Ky. Rev. Stat. 436.020 unconstitutional for the same reason (App. 18). In *Arnett* it observed that: "Some elements of our society are fomenting disrespect for the courts and encouraging contemptuous conduct. The courts are confronted with a serious threat to the structure of our system of justice. Dollar and time limits suitable for conditions of the previous century are not adequate for the conditions of today." 462 S. W. 2d at 948. The legislative determination that contempt is a serious offense, as set forth in the above statutes, and the invalidation of those statutes by the Court of Appeals because it saw criminal contempt as constituting a "serious threat to the structure of our system of justice," show that in light of the "laws and practices of the community taken as a gauge of its social and ethical judgments," *District of Columbia* v. *Clawans, supra,* criminal contempt is considered a serious offense in Kentucky. Since the right to trial by jury may depend on the seriousness with which a particular state regards the offense, as reflected by the

maximum punishment it has authorized, *Dyke* v. *Taylor Implement Manufacturing Co., supra,* the right to trial by jury should attach to alleged criminal contempts committed before the Kentucky courts when a substantial period of imprisonment is imposed as punishment.[8]

Assuming that this Court has not promulgated a "six month rule," and that an offense may be regarded as a serious one in light of other objective criteria reflecting the seriousness of the offense even though the punishment actually imposed does not exceed six months, the petitioner was clearly charged with committing a serious offense within the meaning of the trial by jury guarantee.

Even if this Court were to adopt a "six month rule" and ignore other objective criteria reflecting the seriousness of the offense so long as the sentence imposed did not exceed six months, the entitlement to a jury trial should attach at the time the sentence is originally imposed, and the right to a jury trial should not be able

[8]With the invalidation of the statutes in question, there is no right to a trial by jury in criminal contempt cases in Kentucky unless the punishment imposed exceeds six months. *Local No. 1667, United Auto Workers* v. *Kawneer Co., Inc., supra.* In all other criminal cases tried before the Circuit Court, whether in the exercise of its original jurisdiction, or on *de novo* review of the judgment of an inferior court, see *Colten* v. *Kentucky,* 407 U. S. 104 (1972), there is the right to trial by jury irrespective of the maximum penalty that can be imposed. Ky. Const. § 11. The right to trial by jury is also generally provided for by statute in the inferior courts. *Colten* v. *Kentucky, supra,* at 113. Since Criminal contempt is like other crimes insofar as the right to trial by jury is concerned, *Bloom* v. *Illinois,* 391 U. S. 194, 210 (1968), the disparate treatment in Kentucky of defendants charged with criminal contempt with respect to the right to trial by jury under state law raises serious equal protection questions. *C.f. Baxstrom* v. *Herold,* 383 U. S. 107 (1966).

to be defeated, as it was here, by subsequent modification of the sentence on the part of the trial judge or the reviewing court to bring it within a "six month rule."[4] The imposition of sentences aggregating 54 months' imprisonment, including one year on each of two counts, showed by its severity, *Frank* v. *United States, supra,* that the petitioner was charged with committing a serious offense within the meaning of the trial by jury guarantee, and no subsequent modification of the sentence (particularly when coupled with a characterization of the petitioner's conduct in the most opprobrious terms possible) can alter this "objective indication."

C. This Court should now consider whether criminal contempt is a serious offense within the meaning of the trial by jury guarantee regardless of the penalty involved.

It is respectfully submitted that this Court should now reconsider its view to the effect that, "Criminal contempt is not a crime of the sort that requires the right to a jury trial regardless of the penalty involved," *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and that it should hold that criminal contempt is indeed a serious offense within the meaning of the Sixth Amendment's

[4]Since the Kentucky Court of Appeals requires that separate sentences for contempt be aggregated for purposes of determining entitlement to a jury trial, the case at bar does not present directly the question presented in *Codispoti* v. *Pennsylvania,* No. 73-5615, this Term, as to whether separate sentences must be aggregated for purposes of determining Sixth Amendment entitlement to a jury trial. However, the abuses that can result from permitting trial judges to "parcel out" sentences for separate counts of contempt, as discussed in *United States* v. *Seale,* 461 F. 2d 345, 353-356 (7th Cir., 1972), are clearly illustrated here.

trial by jury guarantee. The justification for holding that all contempts are-not serious offenses has been that, "A person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal." *Frank* v. *United States,* 395 U. S. 147, 149 (1969). However, this justification must be reevaluated in light of present views as to what conduct may constitutionally be punishable as criminal contempt on the ground that it has "blocked the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230 (1962). It is now unmistakably clear that mere disrespect toward the person of the trial judge cannot be punishable as criminal contempt and that improper statements may not be treated as contemptuous unless they have actually disrupted the court proceedings. *In re Little,* 404 U. S. 553 (1972). In a number of cases conduct perceived by the trial judge as contemptuous has been held insufficient to constitute the offense when reviewed by appellate courts or by another "less involved" judge. See *e.g., United States* v. *Oliver,* 470 F. 2d 10 (7th Cir., 1972); *In re Dellinger,* 461 F. 2d 389 (7th Cir., 1972); *In re Brown,* 454 F. 2d 999 (D.C. Cir., 1971); *In re McClure,* 442 F. 2d 836 (7th Cir., 1971); *United States* v. *Meyer,* 346 F. Supp. 973 (D.D.C., 1972). In light of these developments, conduct that can be made punishable as criminal contempt will usually be conduct of a "serious" nature, as that term is commonly understood, and because such conduct must have the effect of actually interfering with the administration of justice, it is likely to be regarded

as contrary to the "social and ethical judgments of the community," *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937), in a society in which the fair and orderly administration of justice is held in high regard. The seriousness of a charge of criminal contempt against an attorney is magnified because of the collateral consequences, such as disbarment or other discipline, that may result from a contempt conviction. *C.f. Sibron* v. *New York,* 392 U. S. 41 (1968).[5] Today, it is very unlikely that a person may constitutionally be convicted of criminal contempt except for engaging in conduct which in most situations would be regarded as extremely serious by the society as a whole. For this reason, it is submitted that regardless of the penalty that is authorized or imposed, a person charged with criminal contempt is charged with a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee, and that in the case of criminal contempt it is the nature of the offense rather than the penalty that should be determinative of the right to a jury trial. *C.f. District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

Another reason why a prosecution for criminal contempt should entitle the alleged contemnor to a jury

[5]In the recent case of *Edmunds* v. *Chang,* ____ F. Supp. ____, Crim. No. 73-3926, U. S. Dist. Ct., D. Haw., Nov. 2, 1973, the Court, in holding that an attorney convicted of contempt and sentenced to pay a $25 fine, could challenge the validity of his conviction in an habeas corpus action, observed that: "An attorney's reputation is his principal professional asset; the success of his efforts often depends on a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere 'moral restraint' to one who occupies the status of an officer of the court." (Slip opinion, p. 5).

trial is that the nature of the offense necessarily involves a confrontation between the accused and the court. By denying the right to a jury trial in any case of criminal contempt, the courts are, in effect, sitting in judgment on their own actions. Justice "must satisfy the appearance of justice, "*Offutt* v. *United States,* 348 U. S. 11, 14 (1954), and the appearance of justice is not satisfied when judges pass on charges of "contempt of court." This principle was seemingly recognized in *Bloom* v. *Illinois,* 391 U. S. 194, 202 (1968), where this Court observed:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

If the Sixth Amendment's guarantee of trial by jury truly does reflect a "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968), there is no case more appropriate for the invocation of that guarantee than a prosecution for criminal contempt. This is particularly so, since it is now recognized that submitting contempt cases to juries will not "handicap the effec-

tive functioning of the courts." *Bloom* v. *Illinois*, *supra*, at p. 209. The constitutional right of trial by jury, it is submitted, should extend to all cases of criminal contempt.

D. This Court should now also consider whether an accused is charged with a serious offense within the meaning of the trial by jury guarantee whenever he faces a possible sentence of imprisonment.

It is respectfully submitted that this Court should now also reconsider the question of whether any offense punishable by a period of imprisonment is beyond the pale of the trial by jury guarantee. In *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court held that an offense could not be considered petty when the authorized punishment exceeded six months, but it also intimated there and has held in cases such as *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), that a person could be imprisoned for up to six months without being entitled to a jury trial. In *Cheff* the Court relied heavily on the statutory definition of a "petty offense" contained in 18 U.S.C. § 1. However, in *Argersinger* v. *Hamlin*, 407 U. S. 26 (1972), the Court rejected such a distinction with respect to the right to counsel and specifically held that the right to counsel attached whenever the accused faced the possibility of any period of imprisonment.

In *Argersinger*, the Court distinguished the right to trial by jury from the right to the assistance of counsel only on the ground that there was "historical support" for limiting the right to trial by jury to "serious cases."

Supra at p. 30. It is respectfully submitted that the possibilty of imprisonment for any period of time makes the offense a serious one within the meaning of the trial by jury guarantee. As the Court observed in *Baldwin* v. *New York, supra* at p. 73, "Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." In *Baldwin* the Court suggested that the "onerous disadvantages" resulting from imprisonment had to be weighed against the benefits that resulted from "speedy and inexpensive non-jury adjudications" when the right to trial by jury was claimed in prosecutions carrying no more than a six month sentence. 399 U. S. at 73. It is respectfully submitted that neither the "different geneology" of the right to trial by jury nor the "balance of convenience" test justifies denial of the right to trial by jury when an accused faces the possibility of imprisonment for any period of time. Just as the assistance of counsel may be no less necessary for a fair trial in a prosecution where the penalty authorized does not exceed six months, *Argersinger* v. *Hamlin, supra* at p. 33, the nature of the right to trial by jury as fundamental to our system of justice, *Duncan* v. *Louisiana,* 391 U. S. 145, 153-157 (1968), does not differ depending on the extent of the possible imprisonment that is involved. This Court should now hold, as Mr. Justice Black, joined by Mr. Justice Douglas, contended in *Frank* v. *United States,* 395 U. S. 147, 159-160 (1969), that when the government can

impose a penalty of imprisonment for any period of time, it has not charged a person with a petty offense, and that person is entitled to be tried by a jury of his peers before he can be sent to prison.

E. In Summary, the Petitioner clearly stood charged with a serious offense, entitling him to trial by jury.

The petitioner asks this Court to hold that since he faced the possibility of imprisonment for contempt, he was charged with a serious offense within the meaning of the trial by jury guarantee. In this regard, it is both the nature of the offense and the fact that he faced the possibility of imprisonment that, he contends, entitles him to this right. He further contends that even if the guarantee of trial by jury does not extend to all cases where a defendant faces imprisonment or to all charges of criminal contempt, in the circumstances of this case, and in light of the "social and ethical judgments of the community," he was charged with a serious offense within the meaning of the trial by jury guarantee, and that the denial of that right to him was violative of the Sixth and Fourteenth Amendments.

II.

The Petitioner Was Deprived of Due Process of Law When the Trial Judge Proceeded Summarily to Find Him Guilty of Contempt and to Impose Punishment.

A. Due process requires that an alleged contemnor be given notice of the charge and the opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed notwithstanding that the alleged contempts have been committed in the presence of the trial judge.

If reasonable notice of a charge and the opportunity to be heard in defense are "basic to our system of jurisprudence," *In re Oliver*, 333 U. S. 257, 273 (1948), it is difficult to see why they are not equally basic in proceedings where a trial judge acts summarily to punish for contempt. While the trial judge may have witnessed the conduct giving rise to the charge, he is not infallible and hopefully is not impervious to being persuaded that he perceived the facts inaccurately. More importantly, he may be mistaken in his view that the conduct constituted criminal contempt. If the alleged contemnor is given notice of the precise charge and an opportunity to be heard, he may succeed in persuading the trial judge that the conduct for which he was cited was not contemptuous, because it did not "block the trial judge in the performance of his judicial duty," *In re McConnell*, 370 U. S. 230 (1962), or did not in any way disrupt the court proceedings. *In re Little*, 404 U. S. 553 (1972). And when the basis for the contempt charge is alleged "disrespect," the trial judge may on reflection realize that he has confused "offense to his sensibilities with obstruction to the

administration of justice." *Brown* v. *United States,* 356 U. S. 148, 153 (1958). A hearing is also necessary to determine if a crucial element of the offense, intention to obstruct, see *e.g., United States* v. *Seale,* 461 F. 2d 345, 367-369 (7th Cir., 1972), was present, a principle that this Court has clearly recognized in cases where the alleged contemnor's state of mind or mental condition was specifically put in issue. *Panico* v. *United States,* 375 U. S. 29 (1963); *Harris* v. *United States,* 382 U. S. 165 (1965). Finally, if for no other reason, a hearing is necessary so that the contemnor may plead matters in mitigation, of which the trial judge may have been unaware. It must be assumed that the trial judge will change his mind and reconsider his ruling if persuaded that he acted erroneously. See the discussion in *Groppi* v. *Leslie,* 404 U. S. 496, 506, n. 11 (1972); *Levine* v. *United States,* 362 U. S. 610, 613-614 (1960); *Brown* v. *United States,* 359 U. S. 41, 52 (1959).

The importance of notice and the right to be heard when the trial judge is proceeding summarily to punish for contempt is underscored by the numerous decisions of this Court holding that persons may not be deprived of property rights or governmental benefits in the absence of notice and hearing. See *e.g., Fuentes* v. *Shevin,* 407 U. S. 65 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corporation,* 395 U. S. 337 (1969). Surely, a person charged with a criminal offense is entitled to the same guarantees of due process, and since it cannot be assumed that judges are or can be permitted to be impervious to

argument or explanation, it is completely immaterial that the judge himself witnessed the acts giving rise to the charge. Fundamental principles of due process prohibit the conviction of a person for a criminal offense where that person has not been given notice of the charge against him and the opportunity to be heard in defense or mitigation.

As emphasized in the Petition for Certiorari (pp. 15-19), this Court has not heretofore been specifically presented with the question of whether due process requires that an alleged contemnor must be given notice of the charge against him and an opportunity to be heard before he is finally adjudged guilty of the offense and punishment is imposed. Nor does Federal Rule of Criminal Procedure 42(a) specifically provide for notice and the opportunity to be heard when the judge is proceeding summarily to punish for contempt. Nonetheless, as this Court has pointed out, where the trial judge acts summarily to punish for alleged contempts committed in his presence, "[t]he contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie, supra* at p. 504. This right, it is submitted, goes to the essence of due process of law and is constitutionally required rather than being, as the respondent here has argued, "a matter of grace."

The necessity of notice and an opportunity to be heard was recognized by the Advisory Committee on the Judge's Function of the American Bar Association Project on Standard for Criminal Justice. The Advance Report of the Committee states as follows:

"F.4 Notice of charges and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U. S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required."[6] Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions,* p. 20 (1971).

The language in *Terry* "reflects the spirit of an earlier time, when courts were less sensitive to the compelling nature of procedural due process guarantees." *Weiss* v. *Burr,* 484 F. 2d 973, 986, n. 25 (9th Cir. 1973). In this day and age it is constitutionally unthinkable that a person could be sent to prison without being

[6]Assuming that this Court continues to uphold the power of judges to punish summarily for contempt, it necessarily follows that the nature of the hearing afforded in such proceedings will differ from the full-scale hearing that is required when the court is not proceeding summarily. See *Johnson* v. *Mississippi,* 403 U. S. 212 (1971); Federal Rules of Criminal Procedure 42(b).

given notice of the charge against him and the opportunity to be heard in his own defense.

In the case at bar the trial judge did not cite and simultaneously punish the petitioner for contempt in order to restore courtroom decorum or the like, but cited him for particular acts that were allegedly contemptuous and waited until the end of the trial to impose punishment. In the recent case of *Weiss* v. *Burr, supra,* the question of an alleged contemnor's right to notice and an oportunity to be heard when the trial judge was proceeding summarily was specifically raised, and the Court held that this right was constitutionally required where, as here, the alleged contemnor was not cited and simultaneously punished for the purpose of restoring courtroom decorum or protecting the safey of court officials. It noted that this Court had discussed the precise question only in *Groppi* v. *Leslie, supra,* and in *Ex parte Terry, supra,* and concluded that the rationale of *Groppi* required recognition of the right to notice and an opportunity to be heard as a constitutional right. It left open the question of whether this right was constitutionally required where simultaneous citation and punishment were necessary to restore decorm or protect safety.

Although in the case at bar it is only necessary for this Court to hold that there is the right to notice and an opportunity to be heard when the trial judge does not simultaneously cite and punish in order to restore decorum or protect safety, the Court should make it clear that this right exists in all cases where the trial judge is proceeding summarily. Regardless of the time

at which the trial judge acts or his motivation for doing so, the fact remains that he is still finding a person guilty of a criminal offense and imposing punishment, and just as no exception to the right of trial by jury is made for contempts arising out of courtroom disruption, *Bloom* v. *Illinois*, 391 U. S. 194, 210 (1968), no exception to the right of notice and an opportunity to be heard should be made for such contempts either.

The right for which the petitioner is contending should be construed to encompass a statement of the precise charge and the facts giving rise to that charge, the opportunity to be heard in defense or mitigation, including, where necessary, the right to present extrinsic evidence, a ruling on guilt or innocence, and the imposition of punishment if the contemnor is found guilty. Assuming that the power of the trial judge to punish summarily for contempt can be exercised either at the time the allegedly contemptuous acts occurred or after the conclusion of the trial, *Sacher* v. *United States* 343 U. S. 1 (1952), the right to notice and an opportunity to be heard likewise should be given at either time. This Court should squarely hold that this right applies to all summary proceedings for criminal contempt, and that the failure to afford it is violative of due process of law.

B. The petitioner was not afforded this right with respect to any of the charges of which he was found guilty.

At no time was the petitioner properly informed of the charges against him or given any meaninfgul opportunity to respond to them. More precisely, the trial judge did not hold a *hearing* on any of the charges, in the sense of separating the contempt charge from the other matters involved in the trial, stating the precise charge and the facts giving rise to that charge, indicating that he was prepared to listen objectively to arguments in defense or mitigation, and so doing, and ruling on the petitioner's guilt or innocence. When the petitioner did have a chance to respond, as he did on counts 2 and 3, the response was essentially one for the record, and the trial judge made it clear that his mind was made up about the petitioner's guilt as soon as he cited the petitioner for contempt.[7] Due process, it is submitted, requires that there be some occasion when the trial judge *thinks* about what he is doing and *decides* whether the person he has cited was really guilty of criminal contempt.

[7]The first citation for contempt occurred during the voire dire examination by the petitioner. The trial judge informed the petitioner that he was in contempt for "asking the same question," and stated that he was going to make his decision as to punishment at the end of the trial. (App. 30). He then ordered the attorneys to file written questions for the voire dire, and the petitioner protested against his ruling at the same time as he was trying to show that he had not committed a criminal contempt. (App. 30-37). During the course of this discussion he did ask the trial judge whether the contempt citation stood (App. 36), and the trial judge subsequently rescinded the citation. (App. 37). However, he included it and imposed a 30 day sentence at the end of the trial, but subsequently realized his mistake and corrected it. (App. 26).

On count 2 the trial judge called the attorneys into chambers and stated that he was holding the petitioner in contempt for "completely ignoring the Court's ruling" with respect to evidence concerning Narvel Tinsley's escape from custody and for "the antics he's going through" (App. 42). However, when he specified the charge some three months later in his "corrected judgment," there was no reference to the supposed "antics." The petitioner was permitted to respond for the record, but the main thrust of the discussion concerned the admissibility of the evidence regarding the escape, and the petitioner continued to try to persuade the judge that the evidence was admissible. In the process both the petitioner and counsel for William M. Tinsley renewed earlier motions to sever, which were overruled (App. 43-53). At various times during the discussion, the petitioner did make reference to the contempt charge (App. 49-53), but his primary concern, necessarily, was to protect the interests of his client, and the response to the contempt charge (which was only for the record) was lost in the shuffle.

The "hearing" on count 3 consisted of the trial judge's saying: 'The court is holding Mr. Taylor in contempt for the second time during this trial for smarting off to the Court in Open Court. That's all I've got to say" (App. 56). The petitioner was given permission to respond for the record and did so (App. 56-59), and then the trial judge said that he would respond for the record. His response consisted of

criticizing the petitioner for leaving the courthouse as soon as the trial was over for the day (App. 59-60). The discussion then drifted into the matter of the petitioner's leaving the courthouse, returned to the tone of voice the petitioner had been using, and ended up with the trial judge accusing the petitioner of not following his orders (App. 60-61). The trial judge then questioned whether the petitioner was properly representing his client and accused him of not knowing how to show proper respect to the court (App. 61-62). Another discussion followed, during which the prosecutor stated that in his opinion the petitioner was trying the case in the best interest of his client, prompting the trial judge to walk out of the room and to order the reporter to record that fact (App. 63). Matters concluded with Narvel Tinsley being called in and examined with respect to his representation by the petitioner (App. 65-68).

There was no specification of the charge whatsoever with respect to count 4. The trial judge simply called the attorneys into chambers and stated, "It's the order of the Court again that Mr. Taylor is in contempt of Court" (App. 69). When he specified this charge three months later, it was that the petitioner had been "most disrespectful to the court and refused to take his seat at counsel table as ordered" (App. 25). After the judge had informed the petitioner that he was in contempt, there was a discussion about admissibility of evidence and the procedure for making objections (App. 70-79). There was no reference at all to the

contempt charge, which at this point had not been specified.

There was likewise no specification of the charge with respect to count 5, and this time when the judge summoned the attorneys into chambers, he did not say that this was because the petitioner was in contempt. He ruled that the witness whom the petitioner had been examining would not be permitted to testify further and then ordered the petitioner to submit "within five minutes" (later changed to ten and then to fifteen minutes) a list of all witnesses that he would be calling in the trial. It was only after this that he said to the petitioner, "and you are also in contempt of court for your actions in the Court just previous to that" (App. 97). He did not specify what those actions were. When the petitioner asked whether he could speak for the record, the trial judge said that he had ten minutes to submit the witness list and that, "You can speak to the record all you want to, sir" (App. 97). The petitioner then challenged the judge's order that he produce a list of witnesses within ten minutes, and when during the course of his argument he said that, "I have, I don't know, five months of my life wrapped up in this case, and maybe more than that," the trial judge interrupted him and acidly observed, "Before it's over, you might have a lot more than that" (App. 98). Various other events occurred during this time in chambers, but there was no discussion whatsoever about the alleged contempt.

There were no conferences in chambers following the citation of the other four contempts. On count 6

the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said he could do so at the next recess (App. 107). However, this opportunity did not occur. On count 7 the trial judge permitted the petitioner to make a response for the record, but then directed the court reporter not to put the response in the record, saying: "I'm not going to even—don't even put this in the record. Mr. Taylor is not running this Court. I am" (App. 109). He specifically refused to permit the petitioner to make a response for the record on count 8 (App. 113). On count 9 he again simply informed the petitioner that he was in contempt (App. 119).

At the end of the trial, after the jury had found both defendants guilty and imposed the death penalty, but while the jury was still in the box, the trial judge summoned the petitioner before the bench, attacked his integrity and professional qualifications, told the petitioner that, "You're not responding to me on anything," threatened to gag him and impose additional contempts if he persisted in trying to speak, and reeled off sentences on nine counts of contempt,[8] ending up by directing peace officers to "take him away." Even in *Sacher* v. *United States*, 343 U. S. 1 (1952), the contemnors were given an opportunity to speak in their defense when the trial judge imposed sentence at the end of the trial, but this modicum of due process was denied to the petitioner here.

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[8]He included the first count, forgetting that he had changed this to a warning. He corrected this error in the "corrected judgment." (App. 26).

If there is any right to notice of the charges and to be heard in defense or mitigation before a person is adjudged guilty of criminal contempt and punishment is imposed, that right was clearly denied to the petitioner. If a person charged with a minor offense were treated in the manner that the petitioner was treated here, there would be no doubt but that there had been a flagrant denial of due process of law. What happened here must truly "shock the judicial conscience," *Rochin* v. *California*, 342 U. S. 165 (1952), and demonstrates most clearly why due process requires at a minimum that an alleged contemnor be given notice of the charges and the opportunity to be heard in his defense.

C. This Court should now consider whether summary punishment for contempt itself is violative of due process of law.

If it is recognized that due process requires that an alleged contemnor be given notice of the charges and the opportunity to be heard notwithstanding that the alleged contempts were committed in the presence of the trial judge, it is but a short step to holding that there can be no justification at all for a judge proceeding summarily to convict and punish a person for criminal contempt, and this Court may now wish to consider whether summary punishment for contempt itself is violative of due process of law. This Court has long recognized that the exercise of the summary contempt power is "arbitrary in its nature and liable to abuse." *Ex parte Terry*, 128 U. S. 289, 313 (1888).

As Mr. Justice Black has stated, "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." *Green* v. *United States,* 356 U. S. 165, 193 (1958) (Black, J., dissenting). It is only in such a proceeding that the otherwise inconsistent functions of the judicial process are combined in a single individual who is necessarily involved in the events leading up to the charge. Again, to quote Mr. Justice Black:

> "When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. . . . To this end no man can be a judge in his case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Green* v. *United States, supra* at p. 199.

If due process requires that the officer presiding over a proceeding which may result in loss of liberty must be "neutral and detached," *Ward* v. *Village of Monroeville,* 409 U. S. 57, 62 (1972), not only is summary

punishment for contempt an anomaly, but it is contrary to the fundamental premises upon which the concept of due process of law is based. It is most clearly a situation "in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey* v. *Ohio,* 273 U. S. 510, 534 (1927).

In *Bloom* v. *Illinois,* 391 U. S. 194, 201 (1968), this Court recognized that criminal contempt "is a crime in the ordinary sense," and again noted that it had "long recognized the potential for abuse in exercising the summary power to imprison for contempt.". It is precisely because the summary contempt power is subject to such potential abuse that its exercise has been strictly limited to matters occurring within the presence of the judge. See *e.g., Johnson* v. *Mississippi,* 403 U. S. 212 (1971). It may also not be exercised when there is the danger that the judge's objectivity can be called into question. See *e.g., Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). Appellate review of the trial judge's findings is considered extremely important, as illustrated by strictness of the certification requirements of Federal Rule of Criminal Procedure 42(a). See *e.g., Tauber* v. *Gordon,* 350 F. 2d 943 (3rd Cir., 1965); *United States* v. *Marshall,* 451 F. 2d 372 (9th Cir., 1971).[9] The potential for abuse and the con-

[9]The fact that appellate review of contempt convictions is available does not vitiate the due process violation inherent in the exercise of the summary contempt power, since there is a right to due process "in the first instance." *Ward* v. *Village of Monroeville, supra* at p. 62.

stant necessity for imposing safeguards against such abuse raise serious questions as to the utility of retaining the summary contempt power.

That the potential for abuse has become a reality is demonstrated empirically by the numerous reversals of summary contempt convictions by appellate courts. In a study conducted by the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, all published cases of summary contempt from 1960 to 1972 were analyzed. This analysis showed that of the seventy-two cases where the trial judge imposed summary punishment, forty (more than 60%) were later reversed by an appellate court. Twenty-three of the reversals were on the merits. Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court,* 233-234 (1973) [hereinafter cited as *Disorder in the Court*]. If this Court holds, as it should, that the due process requirements of notice and an opportunity to be heard apply to summary contempt proceedings, it should consider further whether due process also requires that the summary contempt power itself be given a well-deserved burial.

Two justifications have been traditionally set forth for upholding the exercise of the summary contempt power. The first was that of "preserving order"—the exercise of the power was necessary to preserve order in the courtroom—and the second was that of "judicial economy"—since the trial judge witnessed the contumacious conduct, there was no utility in having a

hearing before another judge. See the discussion in *Cooke* v. *United States,* 267 U. S. 517, 534-539 (1924). The first justification was severely undercut by this Court's decision in *Sacher* v. *United States,* 343 U. S. 1 (1952), where it was held that the trial judge could proceed summarily even though he waited until the trial was at an end to cite and punish for contempt. The "judicial economy" justification is likewise very questionable, since, as pointed out previously, the judge before whom the alleged contempt was committed, even if not disqualified by lack of impartiality, may still be mistaken as to the actual facts and as to whether the conduct of the alleged contemnor amounted to criminal contempt. The fallacy of the "judicial economy" justification is illustrated by the reversal pattern referred to above, and by cases in which on remand there was trial before another judge, and conduct found contemptuous by the judge in whose presence it was committed was found by the other judge not to be contemptuous at all. See *e.g., United States* v. *Meyer,* 346 F. Supp. 973 (D.D.C. 1972). Moreover, again to quote from Mr. Justice Black's dissent in *Green* v. *United States, supra* at p. 216:

> "It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury [or in a trial before another judge]. But such trifling economies as may result have not generally been thought sufficient for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions

> were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

Considerations of "judicial economy" do not justify a departure from those fundamental principles of procedural fairness that are reflected in the concept of due process of law.

If the "judicial economy" justification is found wanting, it is necessary to fall back on the "preserving order" justification. This justification is necessarily inapplicable where, as here, the trial judge waits until after the trial to impose punishment. At a minimum this Court should hold that due process prohibits the exercise of the summary contempt power after the trial has terminated and in any case where such exercise is not shown to have been necessary for the purpose of preserving order in the courtroom. The principle that the summary contempt power may constitutionally only be exercised where necessary to preserve order and prevent disruption was recognized in *In re Oliver,* 333 U. S. 257 (1948), where this Court held violative of due process the summary contempt conviction of a witness for allegedly testifying falsely and evasively before a circuit judge who was conducting a "one-man grand jury" investigation. In response to the argument that summary punishment was proper because the contempt

was committed in the presence of the judge, this Court stated:

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. *Ex parte Terry,* 128 U. S. 289, was such a case. . . . This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances in the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise." 333 U. S. at 274.

The Court also referred to the principle that the authority to punish for contempt was limited to "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 19 U. S. (6 Wheat.) 204 (1821). As one commentator has noted of the decision: "The Court recognized that this contempt was in a sense 'direct' because committed in the presence of the judge. It pointed out, however, that the *need* for summary punishment was not present here as it would be in the case of a heckler in court. In this situation, where the need for immediate punishment was absent, the Court thought that a full adversary hearing was a requirement of due process." Dobbs, Contempt of Court: A Survey, 56 *Corn. L. Rev.* 183, 230 (1971).

It is true that in *Sacher* v. *United States,* 343 U. S. 1 (1952), this Court upheld the propriety of the trial judge's waiting until the end of the trial to punish for contempt, but in *Sacher* the constitutional issue was not presented, since the grant of certiorari was limited solely to the question of whether the trial judge could proceed in this manner under Federal Rule of Criminal Procedure 42(a), *supra* at p. 5, and there was no discussion of the constitutional issue in the opinion. Under the principles recognized in *Oliver,* the exercise of the summary contempt power after the trial or where otherwise not necessary to prevent immediate courtroom disruption is violative of due process of law, and insofar as Rule 42(a) may be construed as permitting such exercise, it should be declared unconstitutional.

The petitioner would go further, however, and contend that the exercise of summary contempt power cannot be justified even where the alleged contemnor is cited and punished immediately in order to prevent alleged courtroom disruption. The denial of due process inherent in the combination of inconsistent functions in the trial judge is the same irrespective of the justification that is advanced for it or the time at which it occurs. *More significantly, the summary contempt power simply is not necessary to prevent courtroom disruption.* The judge can preserve order by means other than the use of the summary contempt power, and there is no reason to believe that removal of this power will have any effect whatsoever on the "orderly processes of justice."

In the first place it is now quite clear that there is no serious quantitative problem of disruption in American courts. See *Disorder in the Court,* pp. 6-9. What little disruption has occurred has been given extensive publicity far out of proportion to its incidence. Disruption by lawyers has been shown to be even more miniscule. *Disorder in the Court,* pp. 131-132. It may also be noted that the focal point of the concern over courtroom disruption, the widely-publicized "Chicago 7" trial, now can be viewed in retrospect as a true aberration, and that the disruption that occurred there was due in no small part to the fact that the trial was presided over by a judge whose "deprecatory and antagonistic attitude toward the defense" was so extreme as to require a reversal of the convictions apart from the numerous other trial errors that he committed. *United States* v. *Dellinger,* 472 F. 2d 340 (7th Cir., 1972).[10] Indeed, there is substantial evidence to the effect that the prime determinant of courtroom disruption will be the actions, positive and negative, of the

[10] When the contempt charges arising out of that case were tried before another judge, Hon. Edward T. Gignoux, sitting by designation, he found the defendants not guilty of all but 13 of the 52 remanded charges. As to those charges, he found that all but two were in response to "peremptory action of the judge" and concluded that the mitigating circumstances present in that case were such that "no warrant exists for the imposition of jail sentences additional to the periods of imprisonment which have already been served by the non-lawyer defendants." Judge Gignoux also observed that: "It is apparent that the contumacious conduct of the defendants and their lawyers cannot be considered apart from the conduct of the trial judge and prosecutors. Each reacted to provocation by the other, and the tensions generated during four and a half months of so acrimonious a trial cannot be ignored." *In the Matter of Dellinger,* 72 Cr. 925, U. S. Dist. Ct., N. D. Ill., Dec. 6, 1973 (slip opinion, pp. 49-50).

trial judge himself. See the discussion in *Disorder in Court*, pp. 192-205.

But assuming that disruption can and does occur, and that the trial judge must be equipped to deal with it, there are numerous other methods he can employ that fall short of imposing summary punishment for criminal contempt and that are not subject to the abuses of the exercise of the summary contempt power which this Court has long recognized, and which are clearly demonstrated in the case at bar. He can deal with the disruptive defendant by using any of the weapons in the "arsenal of authority" set forth by this Court in *Allen* v. *Illinois*, 397 U. S. 337 (1970), including directing the removal of the defendant from the courtroom. With respect to possibly disruptive lawyers, a citation for contempt, which the assurance of subsequent trial and possible conviction and the likelihood of resultant bar disciplinary proceedings, should be a deterrent for all but the most persistently obstructive. In the exceedingly rare case where a lawyer will have embarked on a course of persistent obstruction, it is doubtful if punishment for contempt will make any difference. As stated by the Louisville Bar Association in its *amicus curiae* brief:

> "In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and cite the attorney for Contempt. This would protect the defendant and prevent a complete retrial of a long case after a

> reversal by an Appellate Court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury." Brief of the Louisville Bar Association as Amicus Curiae in Support of Petition for Certiorari, pp. 15-16.

The integrity of judicial proceedings can be fully protected without resort to summary punishment for criminal contempt.[11]

It is a long established principle that a court must exercise "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 19 U. S. (6 Wheat.) 204, 231 (1821); *In re Michael*, 326 U. S. 224, 227 (1945); *Shillitani* v. *United States*, 384 U. S. 364, 371 (1966). Any need to prevent courtroom disruption can be met by means other than the exercise of the summary contempt power. Even if this were not so, the necessity for the exercise of that power would have to be balanced against the departure from the basic standards of fair play and due process that such exercise necessarily entails. In *Bloom* v. *Illinois*, *supra* at p. 208, this Court stated:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without

[11] It is worthy to note that administrative agencies have long been denied the contempt power, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894), and this does not appear to have had any appreciable effect on the conduct of administrative proceedings.

> the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

Summary punishment for contempt is totally repugnant to "those institutionalized procedures which have been worked out over the centuries" and is contrary to the fundamental premises on which the concept of due process of law is based. This Court should now so declare.

III.

In the Circumstances of This Case the Trial Judge Could Not Impartially Sit in Judgment on Multiple Contempt Charges Against the Petitioner.

Although the trial judge cited the petitioner for contempt at various times during the trial, he did not act to impose punishment until after the trial had been completed. Since the trial judge waited until the end of the trial to impose punishment, as the Kentucky Court of Appeals recognized, if he could not impartially sit in judgment on the contempt charges, the petitioner's conviction would have had to have been reversed. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). The Court of Appeals held, however, that the trial judge was not disqualified from sitting in judg-

ment on the multiple contempt charges he leveled against the petitioner.

It is well-settled that the trial judge is disqualified to sit in judgment on contempt charges where he has become *personally embroiled in controversy* with the alleged contemnor, such as where he is an "activist seeking combat," *Offutt* v. *United States*, 348 U. S. 11 (1954), or where he has been the victim or a "personal attack," *Mayberry* v. *Pennsylvania, supra,* or where for any reason he may be biased against the alleged contemnor, *Johnson* v. *Mississippi*, 403 U. S. 212 (1971), or where he has an adopted an adversary posture with respect to the alleged contemnor. *United States* v. *Meyer*, 462 F. 2d 827 (D.C. Cir., 1972). In the case at bar all four elements of embroilment were clearly present, and the holding of the Kentucky Court of Appeals to the effect that in the circumstances of this case the trial judge could impartially sit in judgment on the contempt charges is truly astonishing.

The animus and hostility of the trial judge toward the petitioner is amply demonstrated by his conduct and statements throughout the trial and thereafter. To say the least, the interchanges between the trial judge and the petitioner during the trial "were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor." *Offutt* v. *United States, supra* at p. 12. From the beginning, the trial judge cast aspersions on the petitioner's character and ability and accused him of improper motives. During the voir dire, the trial judge interrupted the petitioner's examination of a prospec-

tive juror and stated that he was going to take it over, saying to the petitioner: "I think you're putting on a show. That's my opinion" (App. 31). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: ". . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (App. 40). In other interchange the trial judge again insisted on indulging in personalities and baiting the petitioner:

> "Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?
>
> The Court: I think that's probably what you're here for, I'm not sure" (App. 61).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

> "Mr. Taylor: The objection is that he uses the word 'also' as inferring that he's got these great confessions.
>
> The Court: Don't go through all those configurations and put on an act." (Tr. 1860)

The trial judge also accused the petitioner of "trying to make every case a political trial," and in a totally unprecedented move, directed that the petitioner prepare a list of every witness he planned to call within fifteen minutes and summarily ruled on whether those witnesses would be permitted to testify. (App. 82-83)

The effect of the trial judge's hostility toward the petitioner on his imposition of the sentences for contempt is graphically illustrated by the following interchange:

> "Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—
>
> The Court: (interrupting) Before it's over, you might have a lot more than that.
>
> Mr. Taylor: Would the Court care to amplify on the meaning of that?
>
> The Court: The Court just made a statement.
>
> Mr. Taylor: Sir, I didn't—
>
> The Court: (interrupting) The Court just made a statement.
>
> Mr. Taylor: Yes, sir, and I asked if the Court would care to expand on the meaning of—
>
> * * * * * * *
>
> The Court: (interrupting) I don't have to explain my comments.
>
> Mr. Taylor: I see. I'm requesting that you reconsider and that you adjourn until tomorrow and give me an opportunity to get before our reviewing Court for a Writ of Mandamus—
>
> The Court: (interrupting) Overruled.
>
> Mr. Taylor: I wonder if I might finish my sentence before you overrule—
>
> The Court: (interrupting) It's overruled" (App. 98-99).

It cannot be doubted that in the case at bar the contempts charged were "entangled with the judge's

personal feeling against the lawyer." *Offutt* v. *United States, supra* at p. 14. Marked personal feelings were present, at least on the part of the trial judge, and as the above examples indicate, he clearly was an "activist seeking combat."

Moreover, while it is indeed true, as the Kentucky Court of Appeals found, that the petitioner did not launch a personal attack against the trial judge (App. 16), the fact remains that the trial judge perceived himself as the victim of such an attack. This appears most clearly in the contempt citations themselves and in his "introductory remarks" thereto, as well as in his language at the time of imposing sentence.

Thirdly, the Court of Appeals was completely incorrect in saying that the petitioner did not attack the trial judge's "integrity or ability" (App. 10). Quite to the contrary, in attempting to defend his client to the best of his ability, it was painfully necessary for the petititoner to accuse the trial judge of denying his client's right to a public trial (App. 79) and of acting on the basis of rancor in ruling that race was not an issue in the case (App. 82). It was also necessary for the petitioner to seek a delay in the case so that he could attempt to obtain a writ of mandamus from the Court of Appeals to prevent the trial judge from proceeding further in the case (App. 98-99). And when the petitioner made some reference to the jury in arguing an evidentiary point, the trial judge accused him of inferring that he, the trial judge, had "rigged the jury." When the petitioner stated that he had filed a motion challenging the jury composition, the trial

judge replied: "I impaneled this jury. If it's rigged, I did it" (App. 86). The petitioner was clearly charging the trial judge with bias and unfairness, and the trial judge was fully sensitive to this charge, as cogently evidenced by his statements in regard to his "rigging the jury." A trial judge is disqualified from proceeding against an alleged contemnor when that person has charged him with bias or unfairness. *Holt* v. *Virginia,* 381 U. S. 131 (1965); *United States* v. *Meyer, supra; In re Dellinger,* 461 F. 2d 389 (7th Cir., 1972). In such circumstances, *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), which was relied on by the Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment against the petitioner, is clearly inapposite. See the discussion in *United States* v. *Meyer, supra,* at p. 845.

Finally, the trial judge is disqualified from sitting in judgment on contempt charges where he has "adopted an adversary posture with respect to the alleged contemnor." *United States* v. *Meyer, supra,* at p. 862. Whatever else may be said about this case, it cannot be denied that the trial judge adopted an adversary posture with respect to the petitioner. In the view of the Kentucky Court of Appeals, the trial judge "appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendant would be assured of a fair trial" (App. 11). While the petitioner would vigorously dispute this characterization of who was put on the defensive by whom, it is utterly incongruous for the Court of Appeals to recognize the adversary posture between the

trial judge and the petitioner and at the same time to hold that the trial judge was not disqualified from sitting in judgment on the multiple contempt charges he levelled against the petitioner.

In the case at bar all four elements of embroilment were clearly present, but even more significantly, the animus and hostility of the trial judge toward the petitioner and his obvious lack of impartiality fairly "scream out" from the record. If "actions speak louder than words," this is manifestly demonstrated by his unprecedented order that the petitioner produce a list of all defense witnesses within fifteen minutes, and his summarily deciding in advance that many of them would not be permitted to testify,[12] by his invalid order prohibiting the petitioner from the further practice of law in "his court," and by his refusal to admit the petitioner to bail or to even hold a bail hearing (at which the petitioner was not permitted to be present) until ordered to do so by the Court of Appeals.

But above all else there is the behavior of the trial judge at the conclusion of the trial when he finally adjudged the petitioner guilty of the contempts charged and imposed consecutive sentences aggregating 54 months' imprisonment. The trial judge not only ac-

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[12]For example:

"The Court: What's Hyde got to do with this?
Mr. Taylor: Quite a bit.
The Court: He just was at that time Chief of Police?
Mr. Taylor: He was in charge of the whole thing.
The Court: Strike him." (Tr. 1989).

And further:

"The Court: I am not going to hold up these proceedings waiting for a witness. If he's here, he can testify, if he isn't, *we'll skip over him.*" (App. 111). (Emphasis added.)

cused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him and impose more contempts if he persisted in trying to do so, and directed the bailiff to "take him away" (App. 28-29). The utter absence of any semblance of impartiality is reflected in the statement he made when he began to impose sentence, "I *have* you on nine counts" (App. 29). (Emphasis added.) The Court of Appeals referred to the trial judge's remarks as "inappropriate," and conceded that they were "somewhat similar to the statements made in *Offutt*" (App. 15-17). But it then went on to say that they did not clearly demonstrate bias. If those remarks and the judge's behavior at the time he was sentencing the petitioner of 54 months' imprisonment do not demonstrate bias, it may seriously be asked what does.

The Court of Appeals then took the rather startling position that "in light of the obvious guilt of Taylor those remarks were not such a showing of bias as to require the disqualification of the judge" (App. 17). It is utterly impossible to see what the supposed "obvious guilt" of the alleged contemnor has to do with the bias of the judge. If the judge has demonstrated by his words and behavior an unmistakable bias against the alleged contemnor, as he did here, he is not capable of maintaining "that calm detachment neces-

sary for fair adjudication," *Mayberry* v. *Pennsylvania, supra,* at p. 465, and cannot impartially sit in judgment on the contempt charges. A clearer case of guilt than was present in *Mayberry* cannot be imagined, *supra,* at pp. 462-463, but the guilt of the contemnor had nothing to do with the ability of the judge to impartially sit in judgment against him.

If trial before an unbiased judge is essential to due process of law, *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968), there was a flagrant denial of due process here when the trial judge sat in judgment on the contempt charges that he leveled against the petitioner.

Although not absolutely necessary to the decision of this case, since the trial judge did not simultaneously cite and punish the petitioner for contempt in order to quell courtroom disruption, this Court should make it clear that where a trial judge is otherwise disqualified to sit in judgment on contempt charges, he may not summarily cite and punish for contempt even if this is purportedly necessary to "preserve order." As pointed out in the previous section of the brief, there are other means by which a judge can maintain order in the courtroom short of the use of the contempt power, and where he cannot impartially sit in judgment, the denial of due process is no less because committed in the name of "preserving order."

The conviction of the petitioner must be reversed, if for no other reason, than that he was denied the right to trial before an unbiased judge.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner for criminal contempt should be set aside.

Respectfully submitted,

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